



FH

**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

[REDACTED]

DECISION

MKB/141794

PRELIMINARY RECITALS

Pursuant to a petition filed June 20, 2012, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Bureau of Long-Term Support in regard to Medical Assistance, a hearing was held on August 23, 2012, at Waukesha, Wisconsin.

The issue for determination is whether the agency properly denied Medicaid (MA) benefits to the Petitioner through the Katie Beckett Program based on Petitioner not meeting the level of care requirement.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: No Appearance
Bureau of Long-Term Support
1 West Wilson

Madison, WI

ADMINISTRATIVE LAW JUDGE:

Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Waukesha County.

2. Petitioner is currently 3 years, two months old. He lives with his parents and two siblings.
3. On March 31, 2012, an application was submitted on the Petitioner's behalf for Children's Long Term Support Waiver, Family Support Program and the Katie Beckett Program.
4. Petitioner's diagnoses include hypotonia, receptive-expressive language disorder and global developmental delay.
5. The Preschool Language Scale test was administered to the Petitioner on March 22, 2012 with results greater than 2 standard deviations delay for receptive and expressive communication skills. An average score on the test is 100 with a score of 85 – 115 considered to be within normal range. Petitioner scored 57 on auditory comprehension and 68 on expressive communication. These scores are in the 1st percentile.
6. Petitioner uses no clear words and no gestures but is able to produce single syllable noises and occasionally two consonant, repetitive sounds. He does not recognize letters and cannot count. He is able to follow a 2 step direction in context.
7. An Evaluation Report by Elmbrook Schools on June 7, 2012 indicates that the Petitioner has significant developmental delays of more than a year in social/emotional skills, play/cognitive skills, gross motor skills, expressive language, language comprehension and self-help skills. His general or overall development at age 33 months was the age equivalent of 20 months.
8. Petitioner requires the assistance of bilateral supramalleolar orthoses to ambulate. He experiences frequent falls. He has decreased upper extremity, trunk and core strength. He has right-side weakness and poor alignment. He climbs stairs but not play equipment. He cannot run or jump. He has decreased visual motor integration, grasping, bilateral integration, fine motor coordination and decreased self-care skills. He has difficulty with sensory integration. He needs daily assistance with bathing, dressing, toileting and grooming. He can feed himself with assistance but is also receiving feeding therapy. He requires cues to chew food laterally on the sides of his mouth. He has to take multiple swallows to clear his oral cavity. He needs assistance with utensils. Petitioner has no concept of using a toilet and does not recognize when he has soiled himself. He needs extensive assistance with toileting.
9. Petitioner can match shapes in a puzzle but struggles to get the pieces together correctly. He is able to stack 5 blocks and works on stringing beads. He is able to scribble on paper but struggles to maintain a grip on the crayon. He cannot imitate play or role play and his overall imaginative play is very limited. He is aware of other children and watches them but does not play with them. He is not able to play appropriately with toys.
10. On March 15, 2012, the Petitioner was evaluated with the Peabody Developmental Motor Scales-2 and found to have significant delays in fine motor skills, scoring in the 1st – 2nd percentile. He scored in the 5th percentile for gross motor skills.
11. Petitioner receives Birth to 3 services for PT, OT, speech and education at New Berlin Therapies since July, 2011. He receives speech/language therapy 3 times/week, physical therapy 1 time/week and occupational therapy 1 time/week. Prior to July, 2011, Petitioner received Early Intervention services in the State of Massachusetts beginning in December, 2009.
12. The agency denied the Petitioner's application on May 18, 2012.

DISCUSSION

The purpose of the "Katie Beckett" waiver is to encourage cost savings to the government by permitting disabled children who would otherwise be institutionalized, to receive MA while living at home with their parents. Wis. Stat. §. 49.46(1)(d)4. The Department's Disability Determination Bureau is required to review Katie Beckett waiver applications in a five-step process.

The first step is to determine whether the child is age 18 or younger and disabled. If the child does not meet the first step, then the application fails. If the applicant meets the first step, there are four other steps that must be met. The second step is to determine whether the child requires a level of care that is typically provided in a hospital, nursing home, or ICF-MR. (The remaining three steps are assessment of appropriateness of community-based care, costs limits of community-based care, and adherence to income and asset limits for the child.)

In this case, there has been a determination by the DDB or SS Administration that the Petitioner is disabled. The agency's determination to deny the Petitioner's application was based a determination that the Petitioner does not meet step 2 of the process requiring the Petitioner to need a level of care provided in a hospital, nursing home, psychiatric hospital/severe emotional disturbance or intermediate care facility/developmental disability (ICF/DD). The Petitioner's parents represented him at the hearing. They do not dispute that the Petitioner does not meet the Hospital Level of Care or the Psychiatric Hospital/Severe Emotional Disturbance Level of Care. They do dispute the agency's finding that the Petitioner does not meet the ICF/DD Level of Care.

The Department developed a policy manual which defines and describes childhood care levels. See Institutional Levels of Care/Children's Long Term Support Programs in Wisconsin.

ICF/DD Level of Care

According to the policy manual, a child may be assigned the ICF/DD Level of Care if the child meets all three of the following criteria:

1. The child has a diagnosis of a cognitive disability that substantially impairs learning and that is expected to continue indefinitely; and
2. The child demonstrates substantial functional limitations when compared to age appropriate activities that are expected to last a year or longer; and
3. The child has the need for active treatment.

Criteria #1: Diagnosis of Cognitive Disability

With regard to the 1st criteria of having a diagnosis of a cognitive disability, the manual notes that the child must have a diagnosis that meets both of the following criteria:

A. The child must have a diagnosis of cognitive disability *or a similar diagnosis that substantially impairs learning*. The following diagnostic categories are considered diagnoses similar to cognitive disability or mental retardation for purposes of criterion 1:
... developmental delay ...

AND

- B. The diagnosis must have resulted in the child having substantial learning impairments as measured by one of the following:
1. A 30% or greater delay in aggregate intellectual functioning based on valid, standardized and norm referenced measure of aggregate intellectual functioning; OR
 2. A score of at least 2 standard deviations below the mean on valid, standardized and norm referenced measures of aggregate intellectual functioning. ...

For example, children who would meet criterion 1 – cognitive disability: ...

- a 2 year old child with global developmental delay who has a 30% delay in cognitive development based on valid, norm referenced Birth-3 testing. This child has a diagnosis similar to a cognitive disability and has a measured substantial impairment in learning and therefore meets criterion 1.

Criterion 1 must be met before considering criterion 2.

In this case, the agency appeared via a written summary dated June 27, 2012 which detailed the basis for the agency's denial of the Petitioner's application.

With regard to the ICF/DD Level of Care, the Department states that current documentation does not support that the Petitioner has a diagnosis of a cognitive disability or exhibits adaptive behaviors similar to a child with a substantial cognitive impairment. The summary does not provide any further detail with regard to the reason the Department made such finding.

The Petitioner's parents dispute the agency conclusion that the Petitioner does not meet criteria #1. In support of their argument, the Petitioner's parents note that the Petitioner's primary diagnoses include global developmental delay. In addition, they note that the Petitioner has a diagnosis of hypotonia. Hypotonia is not a specific medical disorder; rather it is a manifestation of disorders that affect motor nerve control by the brain or muscle strength. The Petitioner's parents indicate that they have been told by the numerous specialists they have seen that the Petitioner is not progressing like other children with hypotonia and that his lack of cognitive skills demonstrate there are underlying issues that have not yet been identified. The underlying causes can be extremely difficult to diagnose.

In addition, the Petitioner's parents note that the Petitioner's scores on the Preschool Language Scale test and the Peabody Developmental Motor Scale demonstrate that the Petitioner has a 30% or greater delay or a score of 2 or more standard deviations below the mean in cognitive functioning, gross and fine motor skills, language comprehension and communication. The Petitioner's parents presented testimony regarding the test scores and the Petitioner's delays. See Findings of Fact #5 – 10 above.

Based on the evidence presented, I conclude that the Petitioner does meet Criteria #1 based on his diagnosis of global developmental delay, scores on standardized tests that show significant delays of more than 2 standard deviations below the norm, and testimony that demonstrates the Petitioner has substantial impairments in cognitive and motor skill function.

Criteria #2: Substantial Functional Limitations

The policy manual indicates the following requirements for Criteria #2:

The child demonstrates substantial functional limitations **when compared to the child's age group** and each limitation must be expected to last **at least 12 months**. The limitations must be the direct result of the child's cognitive disability or similar diagnosis from Criteria #1 and must place the child at risk of institutionalization in an ICF/MR in the absence of extensive, consistent, and direct adult intervention to assist the child in overcoming the limitations, significantly beyond the level of intervention similar aged peers typically require.

The manual goes on to state that the child must demonstrate substantial functional limitations in one or more of the following developmental domains:

1. Communication: A substantial functional limitation in communication is defined as a 30% or greater delay or a standard score of 2 or more standard deviations below the mean

on valid, standardized and norm referenced measures of BOTH expressive and receptive communication functioning.

OR

2. Social Competency: A child has a substantial functional limitation in social competency if the child consistently exhibits one of the following characteristics within the child's age group:

3 years old:

- Does not parallel play with other children; is not comfortable playing with similar toys next to other children
- Does not assume different roles in play; does not engage in make-believe or pretend play
- Does not play in group games with adult supervision; will not play games lead by trusted adults

OR

3. Activities of Daily Living: A substantial functional limitation is a child's inability to perform daily functions without extensive, hands-on assistance significantly beyond the age at which similar aged peers typically require such assistance. This assistance must be needed by the child to complete the task or function at all, rather than to complete the task better, more quickly or to make the task easier. In order for a limitation to be considered a substantial functional limitation, it must:

- Be the direct result of the child's disability; and
- Be exhibited most of the time; and
- Result in the child needing extensive, hands-on adult intervention and assistance beyond the level of intervention similar aged peers typically require in order to avoid institutionalization.

In addition, the child must:

- Require this assistance consistently; and
- Require this assistance for at least the next 12 months; and
- Require this assistance to complete the function across all settings, including home, school and community.

For children under 5 years of age, such a degree of deficit must be evident in at least one of the following seven activities of daily living: bathing, grooming, dressing, toileting, eating, mobility, transfers.

The Department's summary indicates that the agency did not find the Petitioner demonstrates a substantial functional limitation in one or more areas of major life activities.

Based on the evidence as indicated in Findings of Fact #5 – 10 above, the Petitioner meets Criteria #2. He scored more than 2 standard deviations below the norm for expressive and receptive communication on the Preschool Language Scale, he does not play with other children or toys and does not engage in role play and he requires extensive, daily hands-on assistance with toileting, grooming, dressing and eating. All of these limitations are expected to last at least 12 months.

Criteria #3: Active Treatment

According to the policy manual, to meet this criteria a child must require:

A continuous active treatment program that includes aggressive, consistent implementation of training, therapies, health and related services designed to address the child's substantial functional limitations resulting from his cognitive deficits to achieve:

- The acquisition of the skills and behaviors necessary for the child to function with as much self-determination and independence as possible; and
- The prevention of deceleration, regression, or loss of optimal functional status.

For treatment to be categorized as active it must be needed on a continuous and pervasive basis through the child's daily routines in home, school and community. The child must need or be receiving planned and coordinated assistance that is individualized, intensive, interdisciplinary, implemented across environments, of extended duration and relevant to the developmental stages associated with the child's age.

The Petitioner has been receiving active treatment in the form of physical therapy, occupational therapy, speech/language therapy, feeding therapy and music therapy. He has an IEP at school. He has been involved in Early Intervention and Birth to 3 since he was approximately 6 months old. The Petitioner's parents presented sufficient evidence to establish that the Petitioner requires consistent implementation of therapies and services to address his functional limitations throughout the day. These services are clearly necessary to allow him the opportunity to acquire more independent skills and prevent regression or loss of functional skills.

Based on the evidence, I conclude the Petitioner meets Criteria #3.

A child who meets Criterion #1, 2 and 3 meets the ICF/DD Level of Care. Based on the evidence, I conclude that the Petitioner meets all three criteria and therefore meets the ICF/DD level of care.

Because the Petitioner meets the criteria for steps 1 and 2 in the application process for Katie Beckett, the agency must continue the evaluation process to determine Petitioner's eligibility.

CONCLUSIONS OF LAW

1. The petitioner has met the first two steps in the Katie Beckett eligibility process because DDB has determined he is disabled and the Petitioner has presented sufficient evidence to conclude that he meets the ICF/DD level of care.
2. The agency must continue its evaluation process for Petitioner's Katie Beckett eligibility based on the March 31, 2012 application in accordance with Conclusion of Law #1.

THEREFORE, it is

ORDERED

That the matter is remanded to the agency with instructions to: a) continue its evaluation process for Petitioner's Katie Beckett eligibility based on the March 31, 2012 application; and b) issue to the Petitioner's parents a new notice regarding Petitioner's Katie Beckett eligibility within 10 days of the date of this Decision.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

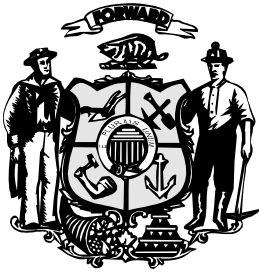
For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 7th day of September, 2012

Debra Bursinger
Administrative Law Judge
Division of Hearings and Appeals

c: Bureau of Long-Term Support - email
Department of Health Services - email



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

David H. Schwarz
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on September 7, 2012.

Bureau of Long-Term Support
Division of Health Care Access and Accountability